Supreme Court, U.S.
FILED
MAR 13 1996
CLERK

(3)

No. 95-1028

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT FADEM AND MARY O. FADEM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

8 pp

TABLE OF AUTHORITIES

Cases:	Page
Block v. *North Dakota*, 461 U.S. 273 (1983)	5
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990)	2, 3, 5
United States v. *Mottaz*, 476 U.S. 834 (1986)	5
Statutes:	
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*	3
Quiet Title Act, 28 U.S.C. 2409a(g)	2, 4, 6
Miscellaneous:	
H.R. Rep. No. 1559, 92d Cong., 2d Sess. (1972)	4, 6

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1028

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT FADEM AND MARY O. FADEM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. Respondent argues (Br. in Opp. 5) that the court of appeals' decision was predicated entirely on the application of the "contours doctrine" (which concerns the scope of the claim of which respondent had notice), and that the court's discussion of equitable tolling was "essentially dicta." That contention is incorrect. Applying the contours doctrine, the court of appeals concluded that the Fadems could not be charged with notice of the government's claim to the portion of the disputed property that lies west of the reservoir. See Pet. App. 4a & n.2, 11a-12a. The contours doctrine played no part, however, in the court of appeals' resolution of the case with respect to the property *east* of the reservoir. The court distinguished between the two parts of the property, and

stated that the Fadems knew "that the Government claimed title to the eastern section." *Id.* at 11a-12a. The court also remanded the case to the district court for consideration of equitable tolling on the facts of this case. *Id.* at 9a-10a. Only equitable tolling could render respondent's claim to the eastern section timely. The issue of equitable tolling is therefore squarely presented in this case.

Although we believe that the court's application of the contours doctrine is incorrect, we have not sought review of that aspect of its decision because the error may be confined to the facts of this case. The court's ruling on equitable tolling, however, has broad implications for the management of federal lands. Those implications are particularly significant in the Ninth Circuit, where the United States has very extensive land holdings, the title to which may be unsettled as a result of the decision below. Although, as respondent notes (Br. in Opp. 6-7), no other court of appeals has considered, since this Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), the precise question whether equitable tolling applies to the statute of limitations in the Quiet Title Act (QTA), 28 U.S.C. 2409a(g), the effect of the decision below in the Ninth Circuit alone would warrant review by this Court.

2. Contrary to respondent's suggestion (Br. in Opp. 8-10), we do not ask the Court to reconsider the holding of *Irwin*. The issue in this case is the application of *Irwin*, as is the issue in *United States* v. *Brockamp*, petition for cert. pending, No. 95-1225 (filed Jan. 31, 1996), and *Webb* v. *United States*, petition for cert. pending, No. 95-1360 (filed Feb. 23, 1996). If the Court grants review in *Brockamp* or *Webb*, it is likely to clarify the circumstances in

which equitable tolling should be applied to statutes of limitations in suits against the government. Because the Court's resolution of that issue may determine whether equitable tolling is available in actions brought under the QTA, this case should be held for the disposition of *Brockamp* and *Webb*.

a. Respondent argues that, under *Irwin*, equitable tolling must be applied (absent congressional direction to the contrary) to all actions against the government that are comparable to actions that may be brought against private litigants. See Br. in Opp. 13. *Irwin*, however, involved a cause of action (under Title VII of the Civil Rights Act of 1964) that Congress itself has made applicable to both the government and private employers, not a cause of action that is merely "comparable" to one that might be asserted against private litigants under some other body of law. As the Court noted in *Irwin*, it had already held that "the statutory time limits applicable to lawsuits against private employers under Title VII are subject to equitable tolling." 498 U.S. at 95. In that context, the Court concluded that "making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver" of sovereign immunity. *Ibid.* The Court also observed in that context that "[s]uch a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation." *Ibid.*

It is true that, under state law, quiet title actions, unlike tax refund suits, may be brought against private parties. But it is also true that, in the Act under consideration here, Congress has provided only for suits against the federal government, and has not

legislated broadly on the subject of land disputes among private parties. Moreover, although Congress could have "adopt[ed] state law in its entirety, thereby placing the United States on the same footing as any private litigant," it chose not to do so, largely because "the wide differences in State statutory and decisional law on this subject [made] this an impractical alternative." See H.R. Rep. No. 1559, 92d Cong., 2d Sess. 5-6 (1972) (letter from Attorney General to Speaker of the House of Representatives). In particular, as the Attorney General pointed out when the QTA was enacted, under state law "there is an immense variation with respect to the period of limitation on bringing suits." *Id.* at 10.* The 12-year limitation period in the QTA supplies a distinct federal rule for suits against the United States.

This case therefore presents the question whether it would be a "realistic assessment of legislative intent" to extend the rebuttable presumption in favor of equitable tolling, articulated in *Irwin*, to a statutory cause of action that runs *only* against the government—or whether that rebuttable presumption is limited to causes of action that may be asserted against both private and governmental litigants, and that must in many respects be construed without regard to the identity of the particular defendant. This Court could decide in *Brockamp* or *Webb* that the *Irwin* rule applies only to causes of action of the

---

* The Attorney General also noted variations in state law as to whether a plaintiff pursuing a quiet title action must be in possession of the property. H.R. Rep. No. 1559, *supra*, at 10; see also *id.* at 6 (noting traditional English practice requiring possession by plaintiff). The QTA does not require the plaintiff to be in possession of the disputed property. See *id.* at 10.

latter kind. In that event, the decision below would be incorrect as a matter of law. The petition in this case should therefore be held for the disposition of *Brockamp* and *Webb*.

b. In addition, as we note in the petition (at 10-12), the *Irwin* rule, even if applicable to all causes of action against the government, is only a rebuttable presumption, and it must give way to a more definite expression of congressional intent about equitable tolling. See *Irwin*, 498 U.S. at 96 ("Congress, of course, may provide otherwise if it wishes to do so."). An issue in this case, as in *Brockamp* and *Webb*, is how the courts should determine whether Congress has "provide[d] otherwise."

We do not argue that the text and structure of the QTA compel the conclusion that the 12-year statute of limitations is a "statute of repose" (see Br. in Opp. 12). We do argue that equitable tolling is nonetheless inconsistent with the QTA's text and structure, because the QTA's 12-year limitation period is "jurisdictional" in nature (*United States* v. *Mottaz*, 476 U.S. 834, 841 (1986); *Block* v. *North Dakota*, 461 U.S. 273, 292 (1983)), and because the QTA's cause of action accrues when the plaintiff "knew or should have known" of the government's claim. See Pet. 11-12.

The "should have known" language provides plaintiffs with protection against unfair prejudice in cases of misrepresentation by the government about the nature of its claim. In such a case, the limitation period would not begin to run until the plaintiff became aware of sufficient facts to dispel the effect of the misrepresentation, such that the plaintiff should have known of the government's claim. It is unlikely that Congress *also* intended for the limitation period to be subject to equitable tolling in such a case. That

interpretation would mean, in effect, that there is no statute of limitations at all in cases involving government misrepresentation. That conclusion is at odds with the text of Section 2409a(g), which imposes a 12-year limitation period, even for causes of action accruing when the plaintiff "should have known" of the government's claim. It is also at odds with Congress's intent to impose a reasonable limit on the prosecution of stale land claims against the United States. That was the point of greatest controversy during the passage of the QTA, and it was resolved by adoption of the 12-year limitation period. See H.R. Rep. No. 1559, *supra*, at 5.

* * * * *

For the foregoing reasons, and for the additional reasons set forth in the petition, the petition for a writ of certiorari should be held pending the final disposition of *United States* v. *Brockamp*, petition for cert. pending, No. 95-1225 (filed Jan. 31, 1996), and *Webb* v. *United States*, petition for cert. pending, No. 95-1360 (filed Feb. 23, 1996), and then disposed of as appropriate in light of the disposition of those cases.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MARCH 1996